No. 89-532

Supreme Court, U.S.
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In The Supreme Court of the United States October Term, 1989

Peat Marwick Main & Co.,

Petitioner,

vs.

W. David Holloway, Cal Acree, Betty Acree, Norita Akers, William Akers, Martha Hester Arnold, R.H. Arnold, Maxine Black, Charlotte Broad, John E. Broad, John W. Broad, DeWayne Broad, Jeremy Bush, Doris Cadwell, Howard Cadwell, Joy Donovan, Lisa Holloway, Hugh Hollowell, Claudette Howe, Joyce McClure, Marville McDaniel, Ann McLoud, Beverly Miller, Fred Miller, Vera Miller, Porter-Strait Instrument Co., Inc., Bobbee Ray, Marshall Udden, Mary Udden, United Resources Building Company, Inc., Robert John Walpole, Charles Woodard, Linda Woodard,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit correctly held that interest-bearing investment instruments sold to the general public in small denominations by two uninsured Oklahoma finance companies, neither of which were subject to a comprehensive set of federal or state regulations designed to protect investors, are securities under the federal securities laws.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari for the reasons set forth below.

COUNTERSTATEMENT OF THE CASE

On September 24, 1984, the second Republic Bancorporation, Inc. ("RBI-II")[1] and its two wholly owned non-bank subsidiaries,[2] Republic Trust & Savings ("RTS") and Republic Financial Corporation ("RFC") sought protection under Chapter 11 of the United States Bankruptcy Code. *In re Republic Trust & Savings Company,* 59 Bankr. Rptr. 606, 608 (N.D. Okla. 1986). Plaintiffs-Respondents and members of the class they seek to represent invested about $72.2 million in various securities offered and sold to the general public by RTS and RFC.

The first Republic Bancorporation, Inc. ("RBI-I"), was a bank holding company that held the stock of Republic Bank & Trust Company ("Republic Bank"), a state chartered, Federal Deposit Insurance Corporation ("FDIC") insured bank (whose certificates this case does *not* concern), as well as the stock of RTS and RFC. As a bank holding company, RBI-I (unlike RBI-II) was subject to the provisions of the Bank Holding Company Act,

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[1] As explained, *infra,* RBI-II was the second entity to bear the name Republic Bancorporation, Inc.

[2] None of these institutions, RTS, RFC and RBI-II, come within the definition of "bank" contained in Section 3(a)(6) of the Securities Exchange Act of 1934, which provides:

> The term "bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the currency pursuant to Section 92 of Title 12, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this chapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

15 U.S.C. §78c(6) (1988).

12 U.S.C. §§1841 *et seq.* (1982 & Supp. V 1987) ("BHCA").

SECURITIES ISSUED BY RFC

RFC was a privately owned Oklahoma corporation operated as a finance company. Its principal activity was raising money by the sale of a variety of interest-bearing securities with varying maturities to the general public. These securities bore the following labels:

> Market Rate Savings Thrift Certificate;
> Three-Month Money Market Thrift Certificate;
> Six-Month Money Market Thrift Certificate;
> Passbook Savings Certificate;
> Negotiable Rate Thrift Certificate - $50,000 series; and
> Negotiable Rate Term Thrift Certificate.

Most securities fell in the $1,500 to $10,000 range. *Holloway v. Peat Marwick Mitchell & Co.*, 879 F.2d 772, 780 n.6 (10th Cir. 1989).

Under the Oklahoma Securities Act, all RFC instruments were deemed securities. Okla. Stat. tit. 71, §1, *et seq.* (1983). RFC submitted prospectuses for its securities to the Oklahoma Securities Commission for review pursuant to the Oklahoma Securities Act. Among other things, the prospectus described (1) the instruments as securities being offered to the general public, (2) the legal authority under which the instruments were issued, (3) the instruments' uninsured nature, (4) RFC's use of the proceeds, and (5) RFC, its directors, and executive officers. Included in these prospectuses were an opinion of counsel, an unqualified auditor's report prepared by petitioner Peat, Marwick, Mitchell & Co., and RFC's financial statements.

The front page of the RFC prospectus contained the following notice in large type:

> THESE SECURITIES ARE OFFERED FOR SALE IN THE STATE OF OKLAHOMA UNDER A PERMIT GRANTED BY THE OKLAHOMA SECURITIES COMMISSION, BUT THIS PERMIT IS PERMISSIVE ONLY AND DOES NOT CONSTITUTE AN APPROVAL, RECOMMENDATION OR

ENDORSEMENT, AND IN NO SENSE IS TO BE REPRESENTED AS AN INDICATION OF THE INVESTMENT MERIT OF SUCH SECURITIES. ANY SUCH REPRESENTATION IS UNLAWFUL.

THE SECURITIES OFFERED HEREBY ARE NOT INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC), FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION (FSLIC), NATIONAL CREDIT UNION ADMINISTRATION BOARD (NCUA) OR ANY COMPARABLE AGENCY OF THE UNITED STATES OR STATE OF OKLAHOMA. (emphasis added).[3]

Through prospectuses and newspaper advertisements, the general public was solicited to purchase RFC securities.

SECURITIES ISSUED BY RTS

RTS was a privately owned Oklahoma corporation operated as a finance company. Although the word "trust" appeared in the company name, it did not manage or hold trusts or engage in traditional trust business. Its principal activity was raising money by the sale to the general public of a variety of interest-bearing instruments of various maturities. Its activities, advertising, loans and debt instruments mimicked those of RFC.[4] RTS was subject to the provisions of the Oklahoma Banking Code of 1965, Okla. Stat. tit. 6, §101, *et seq.* (1983), and was regulated

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[3] The portion of an RFC prospectus set out here was reproduced in the Answer and Reply Brief of Plaintiffs-Appellants/Cross-Appellees filed below.

[4] For instance, the appearance and wording of a typical Six Month Money Market Thrift Certificate issued by RFC was identical to a Six Month Money Market Thrift Certificate issued by RTS. Examples of Six Month Money Market Thrift Certificates issued by RFC and RTS are reproduced in the Appendix to this response at 1a (RFC) and 3a (RTS). Copies were appended as exhibits to Plaintiffs' Amended Complaint.

by the Oklahoma Banking Department.[5] The securities bore the following labels:

> Money Market Thrift Certificate - $2,500 Series;
> Six Month Money Market Thrift Certificate;
> Passbook Savings Certificate;
> Two-Year Term Thrift Certificate;
> Three-Year Floating Rate Term Thrift Certificate;
> Floating Rate Passbook Savings Certificate; and
> Negotiable Rate Term Thrift Certificate.

The securities were issued pursuant to offering circulars prepared by RTS and approved by the Oklahoma Banking Department. Most fell in the $1,500 to $10,000 range. *Holloway*, 879 F.2d at 780 n.6. An offering circular, typically about four pages, described (1) the instruments being offered to the general public, (2) the legal authority under which the instruments were issued, (3) the instruments' uninsured nature, (4) RTS's use of the proceeds, and (5) RTS, its directors, and executive officers. RTS solicited the public to purchase its instruments primarily by the use of offering circulars and newspaper advertisements.

In large type on the front cover of the offering circular was this admonition:

> THESE CERTIFICATES ARE OFFERED FOR SALE IN THE STATE OF OKLAHOMA UNDER AUTHORITY OF TITLE 6 §1001(22), BUT THIS AUTHORIZATION IS PERMISSIVE ONLY AND THE APPROVAL OF THIS CIRCULAR BY THE BANK COMMISSIONER DOES NOT CONSTITUTE AN APPROVAL, RECOMMENDATION OR ENDORSEMENT AND IN NO SENSE IS TO BE REPRESENTED AS AN INDICATION OF THE INVESTMENT MERIT OF SUCH CERTIFICATES.

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[5] The Oklahoma Banking Code defined "trust company" to mean "any person doing trust company business as set forth in this Code . . . " Okla. Stat. tit. 6, §102(k) (1983). A "bank" on the other hand, was defined as "any banks authorized by the laws of the state to engage in the banking business." Okla. Stat. tit. 6, §102(a) (1983). Petitioner has wrongly equated the terms.

> [The Oklahoma Banking Code] STATES THAT A TRUST COMPANY MAY ISSUE DEBENTURES, NOTES OR OTHER EVIDENCE OF DEBT IN THE MANNER IN WHICH BUSINESS CORPORATIONS ARE AUTHORIZED TO DO SO FOR ANY LEGAL APPLICATION OF PROCEEDS, BUT ONLY TO THE EXTENT OF ANY AMOUNT EQUAL TO TEN TIMES ITS CAPITAL AND SURPLUS. THE CERTIFICATES ISSUES HEREBY ARE NOT DEPOSITS AND ARE NOT INSURED BY ANY AGENCY OF THE FEDERAL GOVERNMENT. (EMPHASIS ADDED.)[6]

The offering circular also indicates the "minimum initial investment" which is required to purchase an instrument. The front cover alone contains the word "investment" three times. A typical RTS Negotiable Rate Term Thrift Certificate, which resembled a stock certificate, appears in the Appendix at 6a-7a.[7]

Although within the jurisdiction of the Oklahoma Banking Department, RTS was not a bank and was not subject to the same regulation as a bank. As an Oklahoma trust company, RTS was *not* required to obtain insurance and its instruments were *not* insured by any agency of the state or federal governments.[8] On the other hand, all national and state banks operating

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[6] A copy of the first page of an RTS offering circular is contained in the Record below.

[7] The wording of the RTS Negotiable Rate Term Thrift Certificate was virtually identical to the wording of the RFC Negotiable Rate Term Thrift Certificate, reproduced in the Appendix at 5a. These instruments were made exhibits to Plaintiffs' Amended Complaint.

[8] The Oklahoma law imposed only three basic requirements on trust companies: (a) capitalization of at least $300,000 (§302(b)); (b) loans and issuance of indebtedness could not exceed ten times capital and surplus (§1001); and (c) certain deposits had to be maintained against possible malfeasance claims (§1004).

in Oklahoma were required to obtain FDIC insurance. Okla. Stat. tit. 6, §310(B).[9]

ABSENCE OF FEDERAL REGULATION OF RFC AND RTS

No federal bank regulation protects purchasers of debt instruments issued by companies like RFC and RTS. Nothing in the amendments to the BHCA or its legislative history reflects any intent directly to control, supervise or regulate non-bank

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[9] Review of the Oklahoma Banking Code of 1965, Okla. Stat. tit. 6, § 101 *et seq.* (1983), demonstrates that bank depositors at the time were offered protection which was not provided to holders of trust company securities. For example:

(a) §208(4) of the Banking Code provided public access to reports covering shortages of funds at banks. As to RTS this information was confidential.

(b) §218(B) required that a change in bank control be reported to the Banking Commissioner. No such provision existed for trust companies. This is especially relevant since the divestiture of RTS could not have occurred without the Commissioner's approval had RTS been a bank.

(c) § 802 limited the maximum a bank could loan to a person or entity thereby preventing an undue concentration of loans in a bank's portfolio, which is considered improper banking practice. No such restriction was imposed on RTS.

(d) §809 provided that a bank could not pledge its own assets for the benefit of a customer. This provision did not apply to RTS.

(e) §1404 provided that a managing officer of a bank could not borrow from the bank. This very important safeguard against insider loans and similar transactions did not apply to RTS, which permitted unbridled insider borrowing by its managing officers.

(f) §1406 prohibited a bank from receiving deposits when insolvent. The statute did not apply to RTS, which continued to receive money from investors while insolvent, without interference from the Oklahoma Banking Department.

(g) §1415(A) provided the Commissioner with the power to obtain an injunction against a bank or bank officers for violation of the Banking Code. There was no provision to prohibit RTS or its officers from similar violations.

entities. In fact, the BHCA addresses entities other than the bank itself only in the context of ensuring that those entities pose no threat to the financial stability of the bank.[10] Section 5(e) of the BHCA allows the Federal Reserve Board to order a bank holding company to terminate its ownership or control of a non-bank subsidiary which "constitutes a serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank. . . " 12 U.S.C. §1844(e)(l)(1982). Nothing in §5(e) or anywhere else in the BHCA refers to or provides for the protection of non-bank subsidiaries or the purchasers of their securities where the subsidiary bank's activities threaten the non-bank subsidiaries. The Federal Reserve Board's ultimate enforcement weapon is the ability to force a bank holding company or a bank to divest the non-bank entity.[11] Moreover, the primary reason for an examination of a subsidiary's financial condition is to protect against the "potentially damaging effect on the parent company or its bank subsidiary." Bank Holding Company Supervision Manual at §403.0 (1982).

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[10] RBI-I, the bank holding company which owned Republic Bank, RFC, and RTS, applied for FRB approval under §1843(c)(8) of the BHCA to acquire the voting shares of Guarantee Trust Company, a failed trust company, and to engage in industrial loan activity through Guarantee Trust. The Board held:

> The Board has frequently indicated that it believes that bank holding companies should constitute a source of financial and managerial strength to their subsidiary banks. From the record relating to this application, it appears that applicant's assumption of 80% of Guarantee Trust's unsecured liabilities could adversely affect its ability to serve as a source of financial strength *to its subsidiary bank.* (emphasis added).

Because the acquisition of Guarantee Trust could adversely impact the stability of the subsidiary bank, the Board denied RBI-I's application. *Republic Bancorporation, Inc.*, 67 Fed. Res. Bull. 66 (1981).

[11] Regulation Y of the BHCA specifically addresses the potential impact of non-bank entities on a bank holding company and the FRB's overriding interest in protecting banks. 12 C.F.R. §225.4 (1989). The regulation provides that a bank's holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner. 12 C.F.R. §225.4(a)

Both RTS and RFC had made substantial insider loans to its officers and directors, their relatives, and other entities controlled by officers, directors or their relatives. These loans constituted a large portion of RFC's and RTS's assets.

For several years prior to 1984, the quality of the RTS and RFC loan portfolios had concerned the FRB in its review of RBI-I. On October 27, 1982, the FRB issued a consent cease and desist order to RBI-I. A year later, on October 26, 1983, in response to RBI-I's deteriorating financial condition, the FRB issued a more stringent consent cease and desist order against RBI-I. RBI-I failed to comply with this order.

At about the same time, RBI-I submitted a plan to the FRB calling for the divesture of RBI-I's bank subsidiary, Republic Bank, to a new bank holding company. However, FRB approval was contingent on RBI-I raising $7 million in new capital for the new holding company. On or about June 4, 1984, the FRB notified the RBI-I Board that, because RBI-I had not raised the new capital, both RBI-I and its directors would be assessed civil money penalties until they complied with the October 26, 1983 cease and desist order.

On June 13, 1984, the FRB issued a termination notice compelling RBI-I to terminate both ownership and control of RTS and RFC. The notice stated in relevant part:

> The Board of Governors of the Federal Reserve System (the "Board of Governors") has reasonable cause to believe that the continuation by Republic Bancorporation, Inc., Tulsa, Oklahoma ("Republic"), of its ownership and control of Republic Financial Corporation, Tulsa, Oklahoma ("Republic Financial"), and Republic Trust & Savings Corporation of Tulsa, Oklahoma ("Republic Trust"), nonbank subsidiaries of Republic, *constitutes a serious risk to the financial safety, soundness and stability of Republic's bank subsidiary,* the Republic Bank & Trust Company, Tulsa, Oklahoma (recently renamed the Sunbelt Bank & Trust Company) (the "Bank"), and is inconsistent with sound banking principles. (emphasis added).

See Holloway v. Peat, Marwick, Mitchell & Co., No. 84-C-814-EU (N.D. Okla. January 2, 1987), reproduced in Petitioner's Appendix at 36a-41a (hereinafter the "January 2, 1987 Order").

With no notice of the name swap[12] given to holders of RTS or RFC securities, RBI-I secretly divested itself of RTS and RFC by transferring them to RBI-II, formerly known as Sunbelt Bank Corporation, Inc.[13] Both RFC and RTS continued to issue securities after the divestiture. RTS and RFC investors, along with the general public, discovered the divestiture on September 24, 1984, when RFC and RTS filed for protection under Chapter 11 of the federal bankruptcy code. This lawsuit, alleging, *inter alia*, securities fraud, was filed shortly thereafter.

SUMMARY OF ARGUMENT

Petitioner's brief presents a case that is simply not the case at bar. Despite petitioner's mischaracterization, this case does not involve a bank, savings and loan or thrift; it does not involve certificates of deposit or passbook accounts; it does not involve deposits or demand notes; and it has nothing to do with the banking industry or the savings and loan crisis. The Tenth Circuit's opinion will not unduly broaden federal jurisdiction. Rather, this litigation involves debt instruments, issued to the general public for investment purposes by non-bank companies. Moreover, the case was decided on its particular facts and will have limited application in dissimilar factual contexts.

Nor is the fact that the Court has already granted certiorari in *Reves v. Arthur Young & Co.*, 856 F.2d 52 (8th Cir.), *cert. granted*, 109 S. Ct. 3154 (1989), sufficient reason for the Court

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[12] On June 29, 1984, the name of RBI-I was changed to Sunbelt Bank Corporation, Inc. The post-divestiture structure consisted of RBI-II, a *non-bank* holding company, with two non-bank subsidiaries, RTS and RFC. In addition, RBI-I, a *bank* holding company, had as its subsidiary Republic Bank. As part of the divestiture, many of the obligations owed to RTS and RFC by RBI-I were assumed by RBI-II, notwithstanding its insolvency, and RBI-I was released from those obligations by RTS and RFC.

[13] The investors had no way of knowing that after divestiture RBI-II had become a separate non-bank holding company.

to take this case, or hold it pending the decision. There is little overlap between the cases, either procedurally or factually.

Contrary to petitioner's claim, there is no real conflict among the Circuits with respect to the proper test to use in analyzing whether a note is a security. While there are different tests in use, they involve analysis of essentially the same factors and would all reach the same result here. Moreover, this Court has repeatedly recognized that the determination of what is a security is necessarily a fact question. Whether the Court adopts a single test, and if so, which test is adopted, will not lessen the fact sensitivity of this case.

Finally, the Tenth Circuit correctly decided the case, after considering the two most recent decisions of this Court addressing the issue, *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), and *Marine Bank v. Weaver*, 455 U.S. 551 (1982). In *Landreth*, the Court held that the *Howey* test, *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), was inappropriate for analyzing specifically enumerated types of securities, such as stock. In *Marine Bank*, the Court held that certificates of deposit issued by a federally regulated and insured bank were not securities because investors were abundantly protected by comprehensive federal banking regulations and by federal insurance.

In this case, the instruments at issue are notes, a type of instrument listed in the definition of a security under both acts. The instruments were not issued by a bank, or by any other entity which was subject to comprehensive federal regulation designed to protect investors or which had insurance virtually guaranteeing investors against insolvency losses. Therefore, the instruments are securities. Because the case was correctly decided there is no need for this Court's review.

REASONS FOR DENYING THE WRIT

I. RESPONDENT MISSTATES THE TENTH CIRCUIT'S HOLDING WHICH IS LIMITED IN SCOPE AND DOES NOT INVOLVE BANKS OR DEPOSITS

The case presented in petitioner's brief is simply not *this* case.[14] In its brief, petitioner refers repeatedly to banks, savings and loans and thrifts (Pet. Brf., pp. 16, 19, 24), the savings and loan crisis (Pet. Brf., p. 20), certificates of deposit (Pet. Brf., pp. 15, 22, 23, 24, 25), and passbook accounts (Pet. Brf., pp. 13, 15, 22, 24), none of which is involved in this case.

This case involves two Oklahoma companies, RTS and RFC, both of which were privately owned. Neither of them was a bank, savings and loan association or thrift.[15] For much of the relevant period, these entities were wholly-owned subsidiaries of a bank holding company. RTS was subject to certain state regulations that were different and markedly less stringent than those applicable to state banks, even though administered through the Oklahoma Banking Commission. RFC was subject to no state banking regulation at all. At the federal level, both institutions were reviewed by the Federal Reserve Board, but only to determine whether their existence threatened the bank subsidiary of the

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[14] Only Peat Marwick seeks review in this Court. The remaining defendants, including the corporate officers and directors, have not joined the petition.

[15] The Bank Holding Company Act defines a bank as an institution which both accepts demand deposits or deposits that the depositor may withdraw by check or similar means, and is engaged in the business of making commercial loans. 12 U.S.C. § 1841(c)(1)(B) (1982 & Supp.V 1987). Federal law defines a thrift institution as (1) a domestic building and loan or savings and loan association, (2) a cooperative bank without capital stock organized and operated for mutual purposes and without profit, (3) any Federal savings bank, (4) certain State-chartered savings banks owned by a holding company, or (5) a mutual savings bank not having capital stock represented by shares. 12 U.S.C. §1841(i) (1982 & Supp.V 1987).

holding company.[16] Thus, all of petitioner's arguments regarding the effect of this case on banks, savings and loans, thrifts and the like completely miss the point.

Not only does petitioner mischaracterize the nature of the institutions involved in this case, but it also misstates the nature of the instruments sold to the public. Contrary to petitioner's suggestion, the notes sold to investors here were not demand notes. (Pet. Brf., p. 28.) RTS and RFC placed certain restrictions with respect to redemption of the notes thereby preventing payment on demand. *See* Appendix, pp. 1a-7a for examples of the notes. Thus, the notes were neither demand nor short term notes. *Zeller v. Bogue,* 476 F.2d 795 (2d Cir.), *cert. denied,* 414 U.S. 908 (1973).

Neither were the notes deposits because RFC and RTS, by law, could not accept deposits. Okla. Stat. tit. 6, §402 *et seq.*, §1001 *et seq.* (1983); *Holloway v. Peat Marwick, Mitchell & Co.,* 879 F.2d 772, 777 n. 4 (10th Cir. 1989) (instruments issued by RTS were certificates of indebtedness, not certificates of deposit, because RTS was not a bank and therefore lacked the power to accept deposits; no reason to treat the instruments issued by RFC any differently as it is also a non-bank institution under Oklahoma law); *In Re Republic Trust & Savings Co.,* 59 Bankr. Rptr. 606, 612-13 (N.D. Okla. 1986). Rather, they were investment certificates of various maturities, which carried a fixed rate of return.

For these reasons, all of petitioner's arguments regarding "the savings and lending functions associated with more traditional banks" are inapposite. (Pet. Brf., pp. 6 n. 4, 14 n. 25.) In making these arguments, petitioner repeatedly refers to statistics concerning banks and savings and loans (Pet. Brf., p. 14, n. 25); but again, neither RTS nor RFC was a bank, savings and loan, thrift, industrial bank, credit union, or any other type

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[16] The only reason the FRB was concerned with RTS and RFC at all was that they were owned by a bank holding company. Once ownership changed, in June 1984, the FRB had no further jurisdiction over them. *Holloway,* 879 F.2d at 787.

of "banking institution."[17] As this Court's holding in *Marine Bank* makes clear, the banking context is very different and requires an entirely different analysis.[18]

Petitioner also wrongly states that "this case presents a case of comprehensive federal and state regulation." As both the district court and the Tenth Circuit held, there was virtually no federal regulation of RTS and RFC designed to protect investors in those institutions. *Holloway*, 879 F.2d at 787-88; Jan. 2, 1987 Order, Pet. Brf., p. 38a. What little federal regulation existed was intended solely to protect Republic Bank, the bank subsidiary of RBI-I. As the facts also clearly show, there was no effective state regulation of either company.

Petitioner claims that the Tenth Circuit's holding below will inevitably make all state-regulated banks and bank-like institutions not insured by the FDIC "subject to the comprehensive provisions of the federal securities laws," with "enormous impact" on capital markets. (Pet. Brf., p. 15.) Never explained is the precise impact that can be expected nor its cause. In any case, petitioner's argument is clearly incorrect. The holding does not apply the comprehensive provisions of the federal securities laws to all uninsured state-chartered banks or to their depositors, since the case has nothing to do with banks or banking. There is no suggestion in the opinion that the comprehensive provisions of the acts will be applied to banks or banking institutions.

II. THE FACTS BEING UNIQUE, THIS CASE IS INAPPROPRIATE FOR REVIEW

Petitioner claims that the broad impact of this case makes it one which this Court should review. However, the institutions involved here are *sui generis*. Whether the instruments they sold

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[17] Indeed, the title of the report relied on by petitioners for the statistics cited reveals its inappropriateness. It is titled "Results of General Accounting Office Survey to Identify Uninsured Financial Institutions That Accept Deposits From The Public." As noted above, neither RTS nor RFC was authorized to accept *deposits* at all.

[18] The very fact that RFC and RTS declared bankruptcy demonstrates that they are not banks. Banks, savings and loans and thrifts are excluded from the United States Bankruptcy Code. 11 U.S.C. § 109(b).

to the public are securities must be evaluated in the specific factual context present here.

Petitioner argues that the Tenth Circuit's opinion will have wide-ranging effects on hundreds of similar institutions. (Pet. Brf., pp. 14, 15.) That the institutions and the instruments they issue are "similar" may or may not be true. However, as already noted, banks, savings and loans, thrifts, and credit unions are not affected by the holding, eliminating the vast majority of the institutions referred to by petitioner. As to the remaining institutions, to the extent they are the same, the federal securities laws should apply. Cases like this one, where there is no other effective regulation, are precisely why the federal securities laws were enacted.

Institutions like RFC and RTS are often formed to avoid the comprehensive federal or state banking laws and regulations. Silkey and Pringle, *Trust Companies: Oklahoma's Own Variety of Non-Bank Banks*, 9 Okla. City U. L. Rev. 293 (1984). For such institutions, the rationale behind the *Marine Bank* exception is absent. For this reason, the Tenth Circuit was correct in holding that the instruments issued by RFC and RTS are securities and that their holders may seek a remedy under the federal securities laws. Without these remedies investors are left with little recourse.

Petitioner also alludes to the savings and loan crisis, in an attempt to persuade the Court that the opinion below will worsen it. (Pet. Brf., pp. 16, 20.) This reference is designed only to confuse the issue and divert the Court's attention from the facts of this case which has absolutely nothing to do with savings and loans. The savings and loan crisis involves insurance pools which are being depleted by failing *insured* institutions. In contrast, neither RTS nor RFC was insured. Thus, the decision in this case will have no effect on any savings and loan or insurance fund.

Contrary to petitioner's argument, the holding below will not broaden federal jurisdiction beyond what Congress intended. (Pet. Brf., p. 20.) Rather, the Tenth Circuit has applied the antifraud provisions of the federal securities laws to unregulated,

uninsured companies which sold securities to the general public, as Congress intended these laws to apply.[19]

III. THE COURT SHOULD NOT TAKE THIS CASE WITH *REVES* BECAUSE THE TWO CASES ARE FACTUALLY DISSIMILAR

Petitioner argues that because this Court has already granted certiorari in *Reves v. Arthur Young & Co.*, 856 F.2d 52 (8th Cir.), *cert. granted*, 109 S. Ct. 3154 (1989), its petition for review of this case should be granted as well. (Pet. Brf., pp. 25-28.) Again, petitioner is wrong. The facts in *Reves* are sufficiently different so that the granting of the writ there is immaterial to whether it should be granted here.[20]

Petitioner claims that "[l]ike *Reves*, this case presents what are essentially demand notes which are also depositary instruments." (Pet. Brf., p. 28.) This is clearly untrue, and another example of petitioner's repeated mischaracterization of the facts of this case. As shown above, the instruments at issue here are neither deposits nor demand notes.

Whatever the decision in *Reves*, however, this case is clearly distinguishable. *Reves* involves uninsured demand notes issued by an agricultural cooperative almost exclusively to its members. The general public was not solicited. Depositors received a new demand note with each deposit or withdrawal. The note holders were, almost entirely, farmers who belonged to a traditional agricultural cooperative. It charged a nominal fee, and obtained

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[19] That it is perfectly proper to apply the antifraud provisions of the federal securities laws to certain securities that are exempt from their registration requirements is apparent from the face of the Securities Act of 1933. *See, e.g.*, sections 3(a)(2) and 3(a)(3) of the Securities Act of 1933, 15 U.S.C. §77c(a)(2) and (3) (1988), which exempt certain commercial paper and securities issued by banks from its registration requirements, but not its antifraud provisions.

[20] In *Reves*, the Eighth Circuit applied the test of *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) to determine that the instruments at issue were not securities. The Tenth Circuit rejected use of the *Howey* test here, because the securities fall within the specifically enumerated items which are, by definition, securities.

most of its operating funds from the sale of promissory notes to its members. *Reves*, 856 F.2d at 53.

Here, in contrast, investors dealt at arms-length with RTS and RFC. Investors did not even know of the divestiture which precipitated the bankruptcy until after bankruptcy was already a fact. As in most investment situations, "the issuer ha[d] superior access to and control of information material to the investment decision." *Great Western Bank v. Kotz*, 532 F.2d 1252, 1262 (9th Cir. 1976). The information advantage held by the issuer made plaintiffs, like any investors, dependent on the honesty and goodwill of the issuer to disclose accurate, relevant information. *Holloway*, 879 F.2d at 780.

This case involves the investment of over $72 million in securities which were promoted to the general public and sold to thousands of people, registered with the state securities and banking commissions and sold via prospectuses or offering circulars. The overall context of this case, so critical to the determination, is completely different from that in *Reves*.

Thus, petitioner's argument as to why this Court should grant certiorari in connection with *Reves* is based on false premises. In most important respects, *Holloway* is a very different case from *Reves;* the fact that *Reves* will be considered is irrelevant to the decision here.[21]

IV. THE FEDERAL SECURITIES LAWS WERE MEANT TO COVER INSTRUMENTS SUCH AS THE DEBT INSTRUMENTS SOLD BY RTS AND RFC

This Court has repeatedly held that the federal securities acts should be broadly construed and their definitional sections should not be unduly limited, because the acts are remedial legislation. *Marine Bank v. Weaver*, 455 U.S. 551, 555-56 (1982);

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[21] Respondents agree with petitioner in one respect. This case should not be deferred pending the decision in *Reves*, nor should the Court grant the writ here and then summarily affirm or reverse in light of *Reves*. The facts and issues here are sufficiently different that, if the Court determines to grant the writ, the case deserves full briefing and argument.

United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 847-48 (1975); *Tcherepnin v. Knight,* 389 U.S. 332, 336 n.12 (1967); *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 195 (1963). Indeed, things as diverse as "scotch whisky, self-improvement courses, cosmetics, earthworms, beavers, muskrats, rabbits, chinchillas, fishing boats, vacuum cleaners, cemetery lots and fruit trees" have all been held to be securities. T. Hazen, *The Law of Securities Regulation* §315 at 14 (1985) (footnotes omitted). Petitioner, however, argues for a very narrow definition.

Petitioner wants to remove the protection of the federal securities laws from plaintiffs who have no other federal remedy. This is inconsistent with this Court's repeated admonitions to look at specific facts to determine whether a particular instrument is a security. *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 848-49 (1975); *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967). Petitioner's position is also inconsistent with the acts' fundamental purpose, which is to protect investors. *Herman & MacLean v. Huddleston,* 459 U.S. 375, 380-87 (1983).

Citing *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 849 (1975), petitioner claims that the federal securities acts should apply only to situations where the instrument or issuer is largely unregulated, as was the securities market prior to the enactment of the federal securities laws in 1933 and 1934. (Pet. Brf., p. 17.) Incredibly, petitioner argues that because the state of Oklahoma had some regulation, the federal securities laws should not apply here.

At the time the federal securities laws were enacted, little federal regulation existed for the securities markets. *State* regulation, however, had long been in force. Indeed, by the time the 1934 Act was passed, every state except Nevada had some form of securities act. *Oppenheimer & Co. v. Young,* 9 Fla. 420, 456 So.2d 1175, 1177 (1984), *vacated on other grounds,* 470 U.S. 1078 (1984). *See also* Jacobs, *Litigation and Practice under 10b-5,* Vol. 5, §4 at p. 1-169-70 (2d ed. 1989 Rev.). Congress enacted the federal securities laws because state securities regulation, with its limited jurisdiction, was inadequate to protect investors in a securities market which was increasingly national in scope. *J. Long, Blue Sky Law* (Securities Law Series, Vol. 12) §1.01, p. 1-1 (1989). *See also* L. Loss and E. Cowett, *Blue Sky Law*

3-5 (1958). Given this background, the Tenth Circuit was correct in looking only at whether a comprehensive set of *federal* regulations adequately protects investors. Furthermore, §28 of the 1934 Act explicitly provides for concurrent federal and state regulation. 15 U.S.C. §78bb(a) (1988).

This Court has also recognized that the mere existence of some state regulation, even as extensive as state regulation governing insurance, does not mean that the federal securities laws become inoperative. In *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959), the Court held that variable annuity contracts are securities, subject to all of the provisions of the federal securities laws, even though insurance companies and insurance contracts are highly regulated by the states, and are specifically exempt from the registration requirements of the federal securities laws. 15 U.S.C. §77c(a)(8)(1982). As Justice Brennan pointed out in his concurring opinion:

> however adequately State Securities Commissioners might regulate an investment, it [is] not for that reason to be freed from federal regulation. Concurrent regulation, then, was contemplated by the Acts as a quite generally prevailing matter. [It is not rational] to assume that Congress thought that any business whatsoever regulated by a specific class of officials, [such as] the State Insurance Commissioners, would be for that reason so perfectly conducted and regulated that all the protections of the Federal Acts would be unnecessary. This approach of personally selective deference to the state administrators is hardly to be attributed to Congress.

Id. at 75.[22]

The facts surrounding the issuance of the instruments plaintiffs purchased indicate that they are investments.

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[22] Justice Brennan's opinion also makes clear that the Tenth Circuit's analysis of the interplay of federal and state regulation in light of the Supremacy Clause is correct. *Holloway v. Peat Marwick*, 879 F.2d at 784.

Moreover, because of the lack of comprehensive federal regulation, the protection of the antifraud provisions of the federal securities laws is vital to protect investors. The holding below is correct – the instruments are securities – and there is no need for review by this Court.

V. THE TENTH CIRCUIT PROPERLY CONSIDERED *MARINE BANK V. WEAVER*

In reaching its conclusion below, the court considered *Marine Bank v. Weaver*, 455 U.S. 551 (1982). Comparing the facts here to those which led this Court to conclude that the certificate of deposit at issue in *Marine Bank* was not a security, the Tenth Circuit held that the instruments here are securities. In so doing, the court analyzed *Marine Bank* and applied its legal principles to the facts of this case.

In *Marine Bank*, this Court held that a certificate of deposit issued by a federally regulated bank insured by the FDIC was not a security for purposes of the antifraud provisions of the federal securities laws. The Court reasoned that it was unnecessary to subject such a bank to securities fraud liability because the holder of the certificate was abundantly protected by comprehensive federal banking regulations and insurance which virtually guaranteed against insolvency losses. *Marine Bank* created a narrow exception to securities antifraud coverage for certificates of deposit issued by a federally regulated and insured bank. 455 U.S. at 559.

The Court was careful to point out, however, that its holding in *Marine Bank* did not mean that certificates of deposit could never be securities:

> It does not follow that a certificate of deposit . . . invariably falls outside the definition of a "security" as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

455 U.S. at 560 n.11. The securities at issue here do not fall within the *Marine Bank* exception.

The Tenth Circuit analyzed and evaluated all of the relevant factors, including the context in which the instruments were issued and the regulatory structure applicable to the institutions. The court correctly determined that the certificates offered and sold to the public by RFC and RTS are securities for purposes of the federal securities laws. Because those who invested in these certificates were not abundantly protected by federal banking regulations (or indeed by any comprehensive regulatory scheme) and did not have the benefit of any insurance, the federal securities laws provide their only protection.

Petitioner argues that the Tenth Circuit erroneously ignored state regulation.[23] (Pet. Brf., pp. 13-14.) *Marine Bank,* however, was only concerned with federal regulation. Thus, the Tenth Circuit's opinion in *Holloway* is entirely consistent with that decision. Moreover, as was amply demonstrated above, state regulation was woefully inadequate.[24] Even if there might be a situation where state regulation could be comprehensive enough to provide the protection required under *Marine Bank,* this is not such a case. The issue is not ripe for review here.

Petitioner claims that the "substantial federal regulation" which purportedly existed in this case means that under *Marine Bank,* the instruments sold to plaintiffs are not securities. (Pet. Brf., p. 17 n. 27). As plaintiffs clearly demonstrated and the Tenth Circuit held, federal regulation was minimal at best, and was *not* designed to protect RTS or RFC investors.

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[23] The Tenth Circuit is apparently the first to hold that no amount of state regulation will satisfy *Marine Bank.* That holding was not necessary to its ultimate finding that the RTS and RFC instruments are securities.

[24] In its petition, Peat Marwick virtually ignores the instruments issued by RFC, instead concentrating its rhetoric on RTS and the supposed comprehensive state banking regulation applicable to that institution. Petitioner fails to point out that RFC was never regulated in any way by the Oklahoma Banking Commission. Securities issued by RFC were regulated, as with other Oklahoma corporations, only by the Oklahoma Securities Commission. *See* Brief of the Securities Exchange Commission as Amicus Curiae to the Tenth Circuit in support of plaintiffs, pp. 5-6. *See also* Jan. 2, 1987 Order at 5-7.

Federal regulation was handled through the Federal Reserve Board ("FRB"), administering the Bank Holding Company Act ("BHCA") and related regulations. As the Tenth Circuit noted,

> the primary purpose of the FRB's administration of the BHCA, however, is to protect the stability and financial viability of subsidiary banks held by the holding companies. . . . Thus, if the holding company or its nonbank subsidiaries engage in activities that threaten the financial stability of the bank the FRB has the power under the BHCA to order divestiture of nonbank entities, thereby protecting the bank's depositors.
>
> The district court found that such federal regulation here did not "abundantly protect" the investors because it was aimed at protecting the *bank's depositors,* not investors in the bank holding company and the nonbank subsidiaries. We agree.
>
> The protection afforded the investors in RTS and RFC as a result of federal regulation of RBI's nonbank subsidiaries was merely incidental to the protection of the bank's depositors.

879 F.2d at 787-88 (emphasis orig.). Regulatory protection for investors "was dependent upon the coincidence of their interests with those of the bank's depositors" and "could disappear at any time." As the court also pointed out, "[t]his result is in direct contrast to the securities laws, which would provide continuous protection for such investors, and which provide potential remedies through the anti-fraud provisions." *Id.* at 788.

Obviously, the asserted "substantial federal regulation" is a mere illusion. There was no federal regulation of either RFC or RTS, *at any time* of the type required to invoke the *Marine Bank* exception. Here, federal banking regulations cut plaintiffs loose to save the bank subsidiary. It is difficult to understand how petitioner can claim that federal banking regulations abundantly protected these investors.

VI. THE TENTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

Petitioner suggests that the writ should be granted to resolve a perceived conflict among the Circuits. Petitioner argues that the Tenth Circuit's holding that only federal regulation may be considered in applying *Marine Bank* directly conflicts with the decisions of the Fourth, Fifth and Ninth Circuits. (Pet. Brf. at 16.) All of these cases are distinguishable; none presents a conflict.

In *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985), the Ninth Circuit held that certificates of deposit issued by a Mexican bank to a United States citizen were not securities. The court read *Marine Bank* to mean that:

> when a bank is sufficiently well regulated that there is virtually no risk that insolvency will prevent it from repaying the holder of one of its certificates of deposit in full, the certificate is not a security for purposes of the federal securities laws.

Id. at 1463.

The plaintiff in *Wolf* had conceded that the Mexican government's banking regulations provided certificate of deposit holders with the same degree of protection against insolvency as do United States banking regulations. In fact, the only potential loss came as a result of the devaluation of the peso.

The reasoning of the court in *Wolf* was followed in *West v. Multibanco Comermex, S. A.*, 807 F.2d 820, 828 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987) and *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985).

None of these decisions raised the question whether state regulation could ever satisfy *Marine Bank*, or if so, the extent of state regulation that would suffice. All three involved banks, certificates of deposit and insurance against insolvency losses. Moreover, all involved foreign policy issues completely absent here. Thus, these cases are not inconsistent with the opinion below.

Tafflin v. Levitt, 865 F.2d 595 (4th Cir.), *cert. denied in part and granted in part on unrelated issue*, 109 S. Ct. 2428 (1989), involved certificates of deposit issued by an insured savings and loan. Critical to the court's holding was the existence of a state system of insurance designed to protect holders of certificates of deposit issued by a state chartered institution from insolvency losses.[25] While *Tafflin* did find that Maryland's state banking regulations satisfied the *Marine Bank* standard, those regulations included insurance designed to protect depositors from insolvency losses.

Even if there is some conflict between these decisions and *Holloway*, however, this is not the case for the Court to decide whether comprehensive state regulation can ever satisfy the *Marine Bank* standard. To the extent state regulation did exist here, it was quite limited.

Petitioner also argues that the Circuits apply different tests to notes such as those at issue here, in order to determine whether they are securities, and that this is the case where this Court should decide which of these tests should be applied. In this, petitioner is wrong again.

As the Tenth Circuit correctly held, the *Howey* test is inapplicable here. 875 F.2d at 782. That test, first articulated in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), and later refined in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), was specifically designed to deal with unconventional instruments grouped under the category of "investment contracts." The test simply has no application to instruments specifically enumerated in the statute. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691-92 (1985); *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1136 (2d Cir.

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[25] The fact that the insurance system also collapsed did not mean that the certificates of deposit thereby became securities, because "the nature of an instrument is to be determined at the time of issuance, not at some subsequent time." 865 F.2d at 599, citing *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987), quoting *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1255 (9th Cir. 1976). The insurance existed and protected depositors at the time the certificates were issued; they were not securities then and could not become securities later.

1976) (*Howey* test of "dubious value" in note context); Jacobs, *Litigation and Practice Under Rule 10b-5*, Vol. 5, § 38.03[dd][ii] at p. 2-357 (2d ed. 1989 Rev.) (*Forman/Howey* should not be applied to notes).

Moreover, as to the other tests used for determining whether a note is a security, any conflict is more apparent than real. The commercial/investment dichotomy, risk capital, and family resemblance or literal tests are similar, and usually reach the same result. *See generally* Jacobs, *Litigation and Practice Under Rule 106-5*, Vol. 5, § 38.03[dd] [ii] at 2-357 (2d ed. 1989 Rev.) ("The results obtained by applying the commercial-investment dichotomy, the risk capital test, and the literal approach are generally consistent"); Jones, *Footnote 11 of Marine Bank v. Weaver: Will Unconventional Certificates of Deposit Be Held Securities?*, 24 Hous. L. Rev. 491, 507-08, (1987) ("Although the inquiry under each test is somewhat different, emphasizing different factors, the three tests usually yield the same result"). Analysis of the investments here under any of these tests reaches the same result. The Tenth Circuit's holding is correct and the writ should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully request the Court to deny the petition for a writ of certiorari.

Dated: Chicago, Illinois
November 24, 1989

Respectfully submitted,

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Counsel for Respondents

APPENDIX

Exhibit 10 to
Plaintiffs' Amended Complaint

REPUBLIC FINANCIAL CORPORATION

NAME Mr. or Mrs. Marshall H. Udden

ADDRESS 7718 East 22nd Place, Tulsa, OK 74129

SIX MONTH MONEY MARKET THRIFT CERTIFICATE

^{90}11808

THIS IS TO CERTIFY that for value received this certificate has this date been issued to MR. OR MRS. MARSHALL H. UDDEN for and in consideration of the sum of $ ELEVEN THOUSAND FIVE HUNDRED SIXTY-FOUR AND NO/100--(11,564.00)

Dollars cash in hand paid, the receipt of which is hereby acknowledged. This certificate shall bear interest at 12.12% per annum, compounded, or payable quarterly, and shall be due and payable six months from date and shall be payable only upon surrender of this certificate. The Company reserves the right to redeem this certificate at any time after issue upon thirty (30) days written notice to the holder hereof of its intention to redeem. The holder of this certificate may redeem this certificate at any time after issue provided, however, that the Company may require thirty (30) days written notice to the Company of such intention to redeem and that the Company reserves the right to limit all redemptions of certificates in any calendar month to fifty percent (50%) of the net cash flow of the Company for the preceding calendar month; and further provided that a substantial early withdrawal interest penalty will apply. In the event of early withdrawal, this certificate will receive interest equal to the rate currently in effect for Passbook Savings Certificates less an amount equal to three months interest at such rate.

IN WITNESS WHEREOF, we have caused this certificate to be executed by a duly authorized officer of the Company this 1st day of June, 1984 Matures December 3, 1984

REPUBLIC FINANCIAL CORPORATION

THIS CERTIFICATE ISSUED HEREBY IS NOT INSURED BY ANY AGENCY OF A FEDERAL OR STATE GOVERNMENT

Exec. Vice President

Asst. Secretary

Exhibit 1 to
Plaintiffs' Amended Complaint

REPUBLIC TRUST AND SAVINGS COMPANY

NAME W. David Holloway or Lisa Holloway

ADDRESS 4435 East 13th Place, Tulsa, Oklahoma 74112

N° 945533

SIX MONTH MONEY MARKET THRIFT CERTIFICATE

THIS IS TO CERTIFY that for value received this certificate has this date been issued to W. David or Lisa Holloway for and in consideration of the sum of $ 2,000.00 (Two thousand dollars and no/100)

Dollars cash in hand paid, the receipt of which is hereby acknowledged. This certificate shall bear interest at 13.25% per annum, compounded, or payable quarterly, and shall be due and payable six months from date and shall be payable only upon surrender of this certificate. The Company reserves the right to redeem this certificate at any time after issue upon thirty (30) days written notice to the holder hereof of its intention to redeem. The holder of this certificate may redeem this certificate at any time after issue provided, however, that the Company may require thirty (30) days written notice to the Company of such intention to redeem and that the Company reserves the right to limit all redemptions of certificates in any calendar month to fifty percent (50%) of the net cash flow of the Company for the preceding calendar month; and further provided that a substantial early withdrawal interest penalty will apply. In the event of early withdrawal, this certificate will receive interest equal to the rate currently in effect for Passbook Savings Certificates less an amount equal to three months interest at such rate.

IN WITNESS WHEREOF, we have caused this certificate to be executed by a duly authorized officer of the Company this 13th day of July, 1984

REPUBLIC TRUST & SAVINGS

THE CERTIFICATE ISSUED HEREBY IS
NOT INSURED BY ANY AGENCY OF A
FEDERAL OR STATE GOVERNMENT.

Vice President

Asst. Secretary

Exhibit 8 to
Plaintiffs' Amended Complaint

REPUBLIC FINANCIAL CORPORATION

NAME Jeremy K. or Shirley Bush Matures June 6, 1985
ADDRESS 5009 Deano Place, Route 8, Claremore, OK 74017

804755

NEGOTIABLE RATE TERMS THRIFT CERTIFICATE

THIS IS TO CERTIFY that for value received this certificate has this date been issued to JEREMY K OR SHIRLEY BUSH for and in consideration of the sum of $ ONE THOUSAND TWO HUNDRED FIFTY DOLLARS * * *(1,250.00)********** Dollars cash in hand paid, the receipt of which is hereby acknowledged. This certificate shall bear interest at 12.50% per annum, compounded or payable quarterly and shall be due and payable ONE year(s) from date and shall be payable only upon surrender of this certificate. The Company reserves the right to redeem this certificate at any time after issue upon thirty (30) days written notice to the holder hereof of its intention to redeem. The holder of this certificate may redeem this certificate at any time after issue provided, however, that the Company may require thirty (30) days written notice to the Company of such intention to redeem and that the Company reserves the right to limit all redemptions of certificates in any calendar month to fifty percent (50%) of the net cash flow of the Company for the preceeding calendar month; and further provided that a substantial early withdrawal interest penalty will apply. In the event of early withdrawal, this certificate will receive interest equal to the rate currently in effect for Passbook Savings Certificates less an amount equal to three months interest at such rate.

IN WITNESS WHEREOF, we have caused this certificate to be executed by a duly authorized officer of the Company this 6th day of June, 1984.

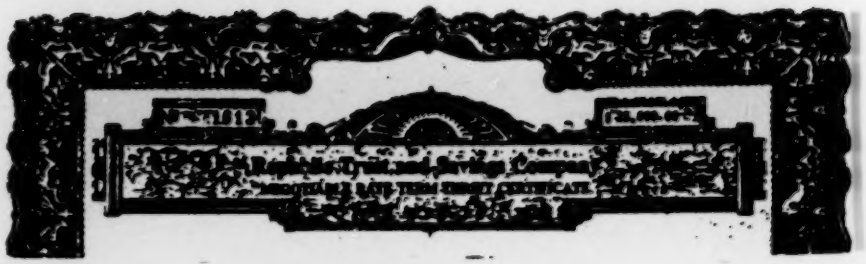
REPUBLIC FINANCIAL CORPORATION

THE CERTIFICATE ISSUED HEREBY IS NOT INSURED BY ANY AGENCY OF A FEDERAL OR STATE GOVERNMENT

President

Secretary

Exhibit 20 to
Plaintiffs' Amended Complaint



THIS IS TO CERTIFY that for value received this certificate has this date been issued to

R.H. Arnold or Marvel McDaniel

for and in consideration of the sum of $25,000.00

Dollars cash in hand paid, the receipt of which is hereby acknowledged. This certificate shall bear interest at 13.25% per annum, compounded or payable quarterly and shall be due and payable 1 year(s) from date and shall be payable only upon surrender of this certificate. The Company reserves the right to redeem this certificate at any time after issue upon thirty (30) days written notice to the holder hereof of its intention to redeem. The holder of this certificate may redeem this certificate at any time after issue provided, however, that the Company may require thirty (30) days written notice to the Company of such intention to redeem and that the Company reserves the right to limit all redemptions of certificates in any calendar month to fifty percent (50%) of the net cash flow of the Company for the preceding calendar month; and further provided that a substantial early withdrawal interest penalty will apply. In the event of early withdrawal, this certificate will receive interest equal to the rate currently in effect for Passbook Savings Certificates less an amount equal to three months at such rate..

IN WITNESS WHEREOF, we have caused this certificate to be executed by a duly authorized officer of the Company this 30 day of July, 1984

Teresa A. Burdette
Ass't

REPUBLIC TRUST AND SAVINGS COMPANY
Vice